Supreme Court, U.S.
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No. 94-501

In The

Supreme Court of the United States

October Term, 1994

LYNETTE HINSHAW,

Petitioner,

vs.

GLORIA S. MAHLER; KENNETH J. MAHLER, Individually and as Personal Representatives of THE ESTATE OF CHRISTIAN DEVON MAHLER, Deceased,

Respondents,

and

CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD NATION,

Intervenor-Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR INTERVENOR-RESPONDENTS IN OPPOSITION TO WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented for review of the Court are as follows:

1. Did the Ninth Circuit Court of Appeals correctly apply established principles of federal Indian law, and the guidance of *National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845 (1985), and *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987), and hold that the Tribal Court of the Confederated Salish and Kootenai Tribes have adjudicatory authority to resolve a wrongful death action brought by a Tribal member against a non-Indian arising from her tortious conduct which occurred on the Reservation.

2. In the unique circumstances of this case, where a Tribal member will be entitled to recovery in both a survivorship and wrongful death action for injuries resulting from Petitioner's tortious conduct on the Reservation, did the Ninth Circuit Court of Appeals correctly determine the Tribal Court of the Confederated Salish and Kootenai Tribes had adjudicatory jurisdiction over both actions.

PARTIES TO THE PROCEEDINGS

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OPINIONS BELOW

The July 11, 1989, Order of the Trial Court of the Confederated Salish and Kootenai Tribes holding that it had adjudicatory jurisdiction over this wrongful death and survivorship action brought by a Tribal member arising out of the tortious conduct of Petitioner on the Flathead Indian Reservation (hereinafter "Reservation") is reprinted in Petitioner's Appendix to its Petition for Certiorari (hereinafter "Pet. App.") at A-1 through A-8. The February 2, 1990, Opinion of the Appellate Court of the Confederated Salish and Kootenai Tribes affirming the Tribal Trial Court's decision is reprinted in Pet. App. at B-1 through B-29.

The January 29, 1993, Opinion and Order of the United States District Court for the District of Montana, Missoula Division, affirming the Tribal Court's jurisdiction over this reservation affair is reprinted in Pet. App. at C-1 through C-31. The final decision, issued by the United States Court of Appeals for the Ninth Circuit in a Memorandum dated June 17, 1994, also affirmed the District Court and the Tribal Court decisions regarding Tribal adjudicatory jurisdiction over this tort action which arose on the Reservation, injured a Tribal member, and found that the Tribes have a "special interest in exercising jurisdiction over those who committed tortious acts within the reservation." is reprinted in Pet. App. at D-1 through D-9.

JURISDICTION

Jurisdiction over the final decision of the Ninth Circuit Court of Appeals lies at 28 U.S.C. § 1254(1). Tribal Respondents received the Petition by mail on September 16, 1994.

CONSTITUTION, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED

This case involves the following ordinances and statutes reprinted in the Tribe's Appendix:

1) Constitution of the Confederated Salish and Kootenai Tribes (relevant portions).

2) Confederated Salish and Kootenai Tribes Ordinance 36-B, Amendment No. 4, governing civil jurisdiction of the Tribal Court.

3) Confederated Salish and Kootenai Tribes Ordinance 40-A, as revised, governing limited assumption of criminal and civil jurisdiction by the State of Montana.

4) Pub. L. 83-280, codified at 18 U.S.C. § 1162 (criminal); 28 U.S.C. § 1360 (civil) and 25 U.S.C. §§ 1321-1322.

5) M.C.A. 2-1-301 through 2-1-307, Pub. L. 83-280 jurisdiction.

STATEMENT OF THE CASE

Consistent with the accepted and usual course of judicial proceedings in *Williams v. Lee*, 358 U.S. 217 (1959),

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), *National Farmers Union Insurance Co. v. Crow Tribe*, 471 U.S. 845 (1985), and *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987), and Congress' policy encouraging self-determination and self-government, the Court below held that the Tribal Court had the authority to resolve a wrongful death and survivorship action brought by a Tribal member arising out of Petitioner's negligent conduct which occurred on the Reservation and resulted in the death of a Tribal descendant. In this case, all parties to the action are residents of the Flathead Indian Reservation, Montana, the Plaintiff is a Tribal member, and the automobile accident giving rise to the tort action occurred on the Reservation. Given that the situs of the harm occurred on the Reservation and resulted in direct injury to the personal and familial interests of a Tribal member, the lower courts all determined that the Tribes have adjudicatory jurisdiction to resolve this reservation affair.

COURSE OF PROCEEDINGS

In 1988, Gloria Mahler, a member of the Confederated Salish and Kootenai Tribes, and Kenneth Mahler, her non-Indian spouse (hereinafter "Mahlers") filed a Complaint against Lynette Hinshaw (hereinafter "Petitioner") in the Tribal Court of the Confederated Salish and Kootenai Tribes (hereinafter "Tribal Trial Court"). The complaint alleged that their son, Christian Mahler, a tribal descendant, was killed in an automobile/motorcycle collision as a result of the negligent conduct of Petitioner which occurred on the Reservation. Christian Mahler was not an enrolled member, but is entitled to

substantial tribal benefits and services based on his status as a Tribal descendant. Gloria Mahler, who is a Tribal member, was not present when the accident occurred but has suffered personal and severe damages as a result of her son's death. Petitioner specially appeared in the Tribal Court action to challenge the authority of the Tribal Court to resolve this reservation affair. The limited facts that have been determined in this case were found by the Tribal Trial Court and are reprinted at Pet. App. at A-2 through A-4. In its decision, the Tribal Trial Court found that it had subject matter jurisdiction over this tort action and personal jurisdiction over Petitioner. The Tribal Appellate Court affirmed the Trial Court's opinion. Even though the auto accident giving rise to these tort claims occurred in 1986, the only question that has been addressed is whether the Tribal Court has adjudicatory authority to resolve this dispute, the question on the merits of the negligence claims against Petitioner have not yet been tried.

Having exhausted her Tribal Court remedies, Petitioner petitioned the United States District Court for review of the Tribal Court's decision pursuant to *National Farmers Union Insurance Company v. Crow Tribe*, 471 U.S. 845 (1985) and *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987), which permits a federal district court to review a tribal court's determination of its civil adjudicatory jurisdiction over actions involving Indian and non-Indian parties, as is the case here. In a well-reasoned opinion, the United States District Court denied Petitioner's motion for summary judgment, and held that Petitioner properly complied with the requirement to exhaust tribal remedies, and held that the Tribal Trial

Court has subject matter jurisdiction over the wrongful death claim brought by a Tribal member as a result of an accident which occurred on the Reservation, and in the specific and unique circumstances of this case, that the Tribal Court had jurisdiction over the survivorship claim brought by a Tribal member on behalf of her deceased son.

The Ninth Circuit Court of Appeals unanimously upheld the District Court's determination of Tribal Court adjudicatory authority over this tort action holding that the Tribes jurisdiction had not been limited by treaty or statute, and the Tribes have not given up their authority to exercise jurisdiction over the Mahler's tort action, and that the Tribes have a special interest in exercising jurisdiction over those who commit tortious acts within the Reservation.

REASONS FOR DENYING PETITION

1. Petitioner Mischaracterizes the District Court's Determination of Tribal Jurisdiction Over the Survivorship Action Brought by a Tribal Member on Behalf of Her Son.

Petitioner confuses the unique circumstances of this case which involves both a wrongful death and survivorship action brought by a Tribal member and her non-Indian spouse for their damages resulting from the death of their son caused by the negligent conduct of Petitioner on the Reservation. The District Court properly rejected Petitioner's characterization of this action as involving claims arising from an automobile accident involving

only non-Indians, and found this characterization to be fundamentally misleading. *Hinshaw v. Mahler*, No. CV-90-71-M-CCL (D. Mont. 1993) (hereinafter "*Hinshaw*") Pet. App. at C-19. Petitioner's sole focus is on the status of herself and Christian Mahler, the victim of the auto accident. As the District Court correctly noted, she fails to recognize that the auto accident, which occurred on the Reservation, is an underlying event which gives rise to two separate and distinct tort claims. One for wrongful death brought by Gloria Mahler, a Tribal member and Kenneth Mahler, her non-Indian spouse for direct personal and familial injuries resulting from the death of their son. The second claim is a survivorship claim brought by Gloria and Kenneth Mahler as co-personal representatives, and beneficiaries of their son's estate. As the District Court stated, "[i]t is the difference between these two claims that is the crux of the jurisdictional issue before the Court." *Hinshaw*, Pet. App. at C-9. After a careful examination of the distinctions between these two claims, the District Court correctly concluded that

> Gloria Mahler's wrongful death claim is personal to her, and no provision of Tribal law requires that she bring it in any capacity other than that as an individual. Therefore, the wrongful death claim constitutes a tort action by a Tribal member for injuries personally suffered by that Tribal member as the result of an accident which occurred on the Flathead Reservation. The Tribal Court has jurisdiction over the claim notwithstanding the fact that the tribal member was not present at the scene of the accident.

Hinshaw, Pet. App. at C-22 through C-23.

Having concluded that the Tribal Court had jurisdiction over Gloria Mahler's wrongful death claim, the District Court stated that this must lead to the further conclusion that jurisdiction over the entire action must lie in Tribal Court. *Hinshaw*, Pet. App. at C-23 through C-28. This is based on the fact that a wrongful death claim has been brought by a Tribal member asserting personal injuries as the result of an accident which occurred on the Flathead Indian Reservation. The District Court reasoned that any wrongful death recovery belongs to Gloria Mahler as an individual and not to the estate of a non-member decedent. *Hinshaw*, Pet. App. at C-24. The District Court noted that although a survivorship claim is raised in a representative capacity, and concerns injuries suffered by Gloria Mahler's non-member deceased son, the Tribal Court "must retain jurisdiction over it lest its authority to hear the wrongful death claim is undermined." *Hinshaw*, Pet. App. at C-24 through C-25. The District Court further reasoned that "[e]xclusive state court jurisdiction over the survivorship claim in this case would place Gloria Mahler on the horns of a dilemma and force her to make a decision which could impact not only her rights as an individual litigant but also upon the lawful authority of the Tribal Court itself." *Hinshaw*, Pet. App. at C-25 through C-26.

The District Court's opinion implicitly recognizes that although Christian Mahler is not an enrolled member of the Tribes, he is part of the tribal community. As a Tribal descendant, Christian Mahler was treated as an "Indian" by the federal government and as such, was entitled to many of the benefits that are extended to Tribal members such as health care provided by the

Indian Health Service, 42 C.F.R. § 36.12 (1993), he could inherit trust or restricted property, 25 U.S.C. § 464, and was entitled to Indian education benefits, 25 U.S.C. § 2651(4)(B). Where a Tribal descendant has been injured by tortious conduct which occurs on the Reservation, and such injury also results in direct injury to a Tribal member, as is the case of Gloria Mahler, the Tribes have a significant interest in providing a forum where such injuries can be remedied. Rejecting Petitioner's arguments, the District Court determined that in the circumstances of this case, exclusive state court jurisdiction over the survivorship claim would constitute an impermissible intrusion by the State into Tribal affairs by undermining the authority of the Tribal Court to hear the wrongful death claim by effectively chilling the Mahler's right to proceed in Tribal Court for that claim. *Hinshaw*, Pet. App. at C-27.

Thus, the District Court's affirmance of Tribal Court jurisdiction over the survivorship action was limited to the specific factual circumstances of this case where such action was joined with a wrongful death action and both actions were brought by a Tribal member for injuries suffered as a result of the death of her son which arose out of an auto accident which occurred on the Reservation, and all parties to the litigation were Reservation residents. Since this case involves these two distinct claims, the District Court refused to answer the question of whether the Tribal Court would be able to assert jurisdiction over the survivorship action had it been brought alone. *Hinshaw*, Pet. App. at C-25. This question is left for another case under different factual circumstances which will have to be evaluated by conducting a

"careful examination" of tribal sovereignty and the extent to which it may be altered or divested.

In this case where the wrongful death action is joined with a survivorship action, the Tribe does have a strong interest in resolving this dispute which arises out of an automobile accident which occurred on the Reservation and which resulted in injury to a Tribal member. Since Christian Mahler was an unmarried minor at the time of his death, his parents will be the beneficiaries of damages recovered under both the wrongful death and the survivorship action. The Tribes, like all governments, have a strong interest in providing a forum to resolve disputes which involve reservation affairs, and also provide a forum where Tribal members can seek redress for injuries suffered as a result of negligent conduct of both Indian and non-Indians alike, and to deter such conduct by permitting parties to bring such actions in a Tribal forum.

Because the District Court, consistent with the decisions of this Court, and consistent with congressional policy, conducted a careful analysis of the Tribe's sovereignty and the extent to which it may have been altered or divested, certiorari is not warranted.

2. The Court Below Fully Considered and Correctly Decided the Issues and its Decision is Consistent with the Relevant Decisions of This Court and with Congressional Policy Encouraging the Development of Tribal Court Systems

A. Petitioner has failed to demonstrate that any Treaty provision or statute specifically divest the Tribes of its power to resolve this dispute which arose on the Reservation and directly injures the personal and familial interest of a Tribal member

The Court below addressed the question of whether the District Court properly held that the Tribes retain authority to resolve a tort action dispute which arose out of Petitioner's negligent conduct on the Reservation and resulted in the death of a Tribal descendant and resulted in direct personal injury to a Tribal member and her non-Indian spouse. The Petitioner's characterization of this case as only involving non-Indians is fundamentally misleading because Petitioner's tortious conduct on the Reservation resulted in injury to a Tribal member, regardless of whether the Tribal member was present when the accident occurred. *Hinshaw,* Pet. App. at C-18 through C-23.

Applying the well-settled analysis developed over 150 years of Indian-law jurisprudence discussing the nature of Tribal sovereign authority and applying this Court's recent pronouncements of these principles, the Court below followed this Court's refusal to automatically "foreclose tribal court jurisdiction over a civil dispute involving a non-Indian," and contrary to

Petitioner's assertions, carefully and diligently applied the analysis suggested by this Court that

> the existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions.

National Farmers Union, 471 U.S. at 855-856. The Court below also applied this Court's elaboration of this principle in *Iowa Mutual*, which recognized that a federal court's exercise of jurisdiction over matters relating to "reservation affairs" can impair the authority of tribal courts and acknowledged the established principle that

> [t]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. Civil jurisdiction over such activities presumptively lies in the tribal courts *unless affirmatively limited by a specific treaty provision or federal statute.*

Iowa Mutual, 480 U.S. at 18 (emphasis added). This method of analyzing the extent to which a Tribe retains its inherent sovereignty to resolve a dispute which arises within its reservation and results in harm to a Tribal member, is consistent with the established principles of Federal Indian Law and is consistent with the *National Farmers Union* requirement that a Court conduct a "careful examination" of the extent and existence of such sovereignty on a case-by-case basis taking into account the relevant treaties, statutes, executive branch policy, and judicial decisions pertinent to the particular Tribe

whose jurisdiction is being challenged. The Court below used this framework in carefully determining the parameters of the Tribe's retained authority to resolve the unique circumstances of this dispute which arose on the Reservation and constitutes a "reservation affair."

The *National Farmer's Union* and *Iowa Mutual* principles, which the Court below applied, recognizes that the powers of Indian Tribes are "inherent powers of a limited sovereignty which has never been extinguished," F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122 (1945), that before the coming of Europeans, the tribes were self-governing sovereign communities. *United States v. Wheeler*, 435 U.S. 313, 322-323 (1978). This Court has stated that "Indian Tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory . . . [they] are a good deal more than 'private voluntary organizations.'" *United States v. Mazurie*, 419 U.S. 544 (1975).

National Farmer's Union and *Iowa Mutual* also recognize the fundamental principle that "Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." *United States v. Wheeler*, 435 U.S. 313, 323 (1978); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 146 (1982); *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134, 152 (1980); *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 425-426 (1989). This principle was recently reiterated by this Court in *Iowa Mutual* by stating "Civil jurisdiction over such activities [of non-Indians on reservation lands] presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision

or federal statute." *Iowa Mutual*, 480 U.S. at 18. The areas where the Court has found such divestiture of Tribal powers has been very limited, for example: Indian Tribes as "domestic dependent nations" are divested of any power to determine their external relations, and therefore do not have the power to enter into diplomatic relations with foreign nations, *Worcestor v. Georgia*, 31 U.S. (6 Pet.) 515, 559-560 (1832), and Tribes may not alienate their lands freely, *see Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974).

In the area of criminal jurisdiction over non-Indians, Tribal authority has been divested because it is inconsistent with the overriding interest of the national sovereignty of the United States. *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 210 (1978). In 1990, this Court in *Duro v. Reina*, 495 U.S. 676 (1990), extended *Oliphant* to hold that another area where Tribal authority was divested, was in asserting criminal jurisdiction over Indians who commit crimes on a reservation but who are not members of the Tribe who is asserting jurisdiction. The *Duro* Court, however, expressly distinguished the area of civil jurisdiction over non-members, stating that it recognized "broader retained tribal powers" in this area. *Id.* at 687-688. The *Duro* Court also acknowledged that some aspects of inherent sovereignty are territorial in nature.

Duro is important because Congress took unprecedented swift action and passed legislation clarifying and reaffirming the inherent sovereignty of tribal governments to exercise criminal jurisdiction over all Indians on their reservations. Congress clearly indicated its intent to limit the areas that Tribal power is divested over non-members and to strongly support and encourage tribal

self-government and authority over incidents which occur within reservation boundaries.[1] Congress also noted two fundamental maxims of Indian law: First, that Congress determines Indian policy, and second, Indian Tribes retain all rights and powers not expressly divested by Congress. H.R. CONF. REP. No. 261, 102nd Cong., 1st Sess. 3 (1991).

As the *Duro* Court noted, and Congress reaffirmed, the development of principles governing civil jurisdiction in Indian country has been markedly different than the development of rules dealing with criminal jurisdiction and *Oliphant* has not been extended to the questions of Tribal civil adjudicatory jurisdiction over non-Indians involving reservation affairs. *See* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 253 (1982 ed.); *Duro*, 495 U.S. at 687-688. Rather, "the question whether a tribal court has the power to exercise civil subject-matter jurisdiction over non-Indians . . . is not automatically foreclosed . . . ," *National Farmers Union*, 471 U.S. at 855, and Tribal authority over the activities of non-Indians on reservation lands is an important part of sovereignty, and that civil jurisdiction over such activities presumptively

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[1] Reaffirmance of Tribal authority over criminal activity by Indians, both Tribal members and non-members, can be explained by the serious nature of the conduct of a non-member Indian and the special interest a tribal government has in keeping peace on its reservation by providing a forum where such conduct can be deterred. This is similar to the circumstances of the case at hand, given the serious nature of Petitioner's conduct on the Reservation which resulted in death to a Tribal descendant, and injury to a Tribal member, and the Tribe's special interest in exercising jurisdiction over those who commit tortious acts within Reservation boundaries.

lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute. *Iowa Mutual*, 480 U.S. at 18. Also, as the *Iowa Mutual* Court recognized the established principle that if "state-court jurisdiction over Indians or activities on Indian lands would interfere with tribal sovereignty and self-government, the state courts are generally divested of jurisdiction as a matter of federal law." *Id.* at 15. *See Williams v. Lee*, 358 U.S. 217 (1959).

The decision below is consistent with this well-settled area of law, and with this Court's recognition that Tribal Courts play a vital role in tribal self-government, *United States v. Wheeler*, 435 U.S. 313, 322 (1978), and that the Federal Government has consistently encouraged their development. The most recent congressional policy, the Indian Justice Support Act, enacted in 1993, provides for the enhancement of tribal courts by providing technical and financial assistance to tribes. 25 U.S.C. § 3501, et seq. (1993). In this Act Congress declared and reaffirmed that:

> . . . (4) Indian tribes possess the inherent authority to establish their own form of government, including tribal justice systems;
>
> (5) tribal justice systems are an essential part of tribal governments and serve as important forums for ensuring public health and safety and the political integrity of tribal governments;

> (6) Congress and the Federal courts have repeatedly recognized tribal justice systems as the appropriate forums for the adjudication of disputes affecting personal and property rights;

25 U.S.C. § 3601. Congress also reaffirmed the "long-standing position . . . that Indian Tribes retain all rights and powers not expressly divested by the Congress." H.R. REP. No. 205, 103rd Cong., 1st Sess. 5 (1993), *reprinted in* 1993 U.S.C.C.A.N. 2425.

In *National Farmers Union*, with facts similar to this case, this Court, recognizing the commitment of Congress to support self-determination and self-government, declined to exercise jurisdiction over a non-Indian's challenge of the Crow Tribe's authority to hear a tort action arising from an automobile and motorcycle accident at a state school within the exterior boundaries of the reservation until the Tribal court first had the opportunity to hear the challenge and make a determination regarding its adjudicatory jurisdiction. This deference afforded to Tribal Courts is in furtherance of Congress' commitment to tribal self-government and self-determination over reservation affairs. *Id.* at 856-857. *Iowa Mutual*, also involved facts similar to this case, where a member of the Blackfeet Tribe sued his employer, a Montana corporation, in Tribal Court. The nature of the suit was a tort action arising out of an automobile accident on the Blackfeet Reservation, and the Tribal member sought compensation for his personal injuries and for his wife's loss of consortium. The Tribal members also filed an action against the insurance company for bad faith refusal to settle. After the Tribal Court determined it had subject matter jurisdiction over these tort claims, the insurance company filed an action

in federal District Court alleging diversity of citizenship. On certiorari, this Court stated that a "federal court's exercise of jurisdiction over matters relating to reservation affairs can also impair the authority of tribal courts . . . ," *Iowa Mutual*, 480 U.S. at 15, and "that unconditional access to the federal forum would place it in direct competition with the tribal courts, thereby impairing the latter's authority over reservation affairs." *Id.* at 16. Accordingly, the *Iowa Mutual* Court held that the insurance company must exhaust available Tribal Court remedies before instituting an action in federal court. *National Farmers Union* and *Iowa Mutual* reaffirmed tribal sovereignty over tort actions involving non-Indians because the Court clearly anticipated circumstances where a Tribe would retain this authority, otherwise there would be no reason to require a non-Indian defendant to exhaust tribal remedies.

These decisions and congressional policies, like the decision below, recognize that an important attribute of self-determination and self-government is exercising authority over disputes that arise within the territorial boundaries of a reservation; that Indian Tribes have a strong interest in providing a forum for those injured by tortious conduct which occurs on the reservation and which impacts upon the interests of Tribal members. The deference afforded to Tribal Courts, in *National Farmer's Union* and *Iowa Mutual*, demonstrates the importance and role of Tribal Courts in resolving disputes between Indians and non-Indians on the reservation. These decisions also encourage Tribal Courts to maintain fair and efficient proceedings since federal courts may review

their determinations regarding subject matter jurisdiction.

In *Williams v. Lee*, 358 U.S. 217 (1959), this Court recognized Tribal Court jurisdiction in an action brought by a non-Indian against an Indian for a reservation-based debt. This Court held that the appropriate forum to adjudicate the dispute was the Tribal Court because

> to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there. The cases in this Court have consistently guarded the authority of Indian governments over their reservations.

Id. at 223 (citations omitted).

In *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), this Court stated that "[t]ribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians," *Id.* at 65, and that Tribal courts are important mechanisms for protecting significant tribal interests. *Wheeler*, 435 U.S. at 322.

It is against this backdrop of tribal sovereignty that the court below followed established decisions of this Court and carefully analyzed the question of whether the Tribal Court of the Confederated Salish and Kootenai Tribes have the authority to resolve the wrongful death and survivorship claims brought by a Tribal member and

her non-Indian spouse arising out of an automobile accident which occurred on the Reservation, and resulted in the death of a Tribal descendant.

Petitioner concedes that the analytic framework in *National Farmers Union*, requiring a careful examination of the multitude of considerations regarding tribal civil jurisdiction, establishes the proper framework to analyze a Tribal Court's determination of its jurisdiction, Petition at 13. However, as she has argued throughout this entire review process, she simply disagrees with the result the lower courts have reached when they applied these established principles for determining whether the Tribes retain this important attribute of sovereignty. As noted above, the language regarding tribal presumptive authority in *Iowa Mutual* is consistent with *National Farmers Union* and with established principles of federal Indian law and congressional policy in determining the parameters of civil adjudicatory jurisdiction over non-Indians who commit torts on a reservation. In addition, there is no conflict of authority among the Circuit Court of Appeals on the questions presented for review.

Having failed to convince any of the lower court's of her arguments, Petitioner attempts to persuade this Court that this case involves only non-Indians, because Gloria Mahler, a Tribal member, was not present at the accident, thereby attempting to bring this case within the decisions of *Montana v. United States*, 450 U.S. 544 (1981), and *Brendale v. Confederated Tribes and Bands of the Yakima Nation*, 492 U.S. 408 (1989) (plurality), which addresses tribal civil regulatory authority and not tribal adjudicatory authority. This characterization of the claim as involving only non-Indians is disingenuous and was

flatly rejected by the District Court as misleading, because although Gloria Mahler, a Tribal member, was not present when the accident occurred, she has suffered severe personal injury as a result of Petitioner's negligent conduct which occurred on the Reservation. Therefore, the claims being litigated involve an action between a Tribal member and a non-Indian. *Hinshaw*, Pet. App. at C-19. Moreover, both of these cases are distinguishable on the facts and the law.

Both *Montana* and *Brendale* involved a situation where a Tribe was attempting to assert civil regulatory jurisdiction over non-Indian use of fee lands on the reservation. In this case, the Tribes are not attempting to regulate the use of fee lands within the Reservation, but rather are asserting the right to adjudicate a dispute which arose within the Reservation boundaries and injured a Tribal member. In this case, Petitioner's presence and the serious nature of her conduct on the Reservation, which resulted in the death of a Tribal descendant, subjects her to the jurisdiction of the Tribal forum. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 147 (1982) (non-members presence and conduct on Indian lands conditioned by limitations the Tribe may choose to impose); *Duro v. Reina*, 495 U.S. at 706 (the commission of a crime on the reservation is all the "consent" that is necessary to allow a tribe to exercise criminal jurisdiction over the non-member Indian) (Brennan dissenting). In both *Montana* and *Brendale*, the Court conducted extensive findings of the demographics of the reservation, the general status of land ownership, and the current uses of the land in question, none of these types of findings of fact were determined or are of record in this case. These

types of factual findings are not relevant in determining adjudicatory jurisdiction over a tort action arising on the reservation. For example, although, *National Farmer's Union* involved a tort action arising out of an automobile and motorcycle collision on land owned by the State on the Crow Reservation, the land status was not a major consideration of the court in determining whether tribal exhaustion was required. 471 U.S. at 845; *e.g., Williams v. Lee*, 358 U.S. 217 (1959). In this case, there are no findings of fact regarding the land status where the accident occurred. Findings of Fact, *reprinted at* Pet. App. at A-2 through A-4.

Moreover, even if these cases apply, the exercise of Tribal Court jurisdiction in this case would be appropriate because the District Court's decision is consistent with the *Montana* and *Brendale* principle's that a tribe may retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within the reservation when that conduct threatens or has some direct effect on the tribe's political integrity, economic security, or health or welfare. The District Court correctly determined that the tortious conduct of Petitioner which occurred on the Reservation has a direct and serious impact on the health and welfare of a Tribal member, and hence the Tribe, and that exclusive state court jurisdiction over this matter would result in a serious impact on the political integrity of the Tribes by undermining its authority over reservation affairs. As the Court below noted, the Tribes have a special interest in asserting jurisdiction over those who commit tortious acts within the Reservation. As this Court noted in *Iowa Mutual*, unconditional access to

another forum impairs the authority of a Tribe over reservation affairs, therefore, seriously and demonstrably effecting the political integrity of the Tribes.

As this Court well knows, there is no bright-line test in analyzing a Tribe's adjudicatory jurisdiction, each case must be evaluated on its own unique factual circumstances giving rise to the cause of action, the nature of the tort, the location where the tortious conduct occurred, the status of the parties, as well as an evaluation of the treaties, statutes, executive branch policy and judicial decisions which define and provide the limits to a particular Tribe's sovereign authority. The court below, contrary to Petitioners assertions, did conduct the requisite "careful examination" of the unique circumstances of this case and of the relevant treaty, statutes, executive branch policy, and judicial decisions pertaining to the Tribes.

The unique political status of the Tribes was confirmed by the Treaty of Hellgate of July 16, 1855 (12 Stat. 975). The District Court noted that pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. § 461 et seq., the Tribes adopted a federally-approved constitution that affirms the right to develop a court system. Tribes Appendix at App. 1 through App. 5. The District Court also recognized this Court's consistent statement that Tribal courts play a vital role in tribal self-government and the federal government has consistently encouraged their development. *See Hinshaw*, Pet. App. at C-26 through C-27. *See also Iowa Mutual*, 480 U.S. at 14-15; *Wheeler*, 435 U.S. at 332; *Santa Clara Pueblo*, 436 U.S. at 65; *Williams*, 358 U.S. at 220-223. The District Court also noted that the Tribes have developed a comprehensive court system whose civil jurisdiction is defined by Tribal Ordinance

36-B (as amended), a federally approved set of laws and procedures entitled "The Law and Order Code of the Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation." *Hinshaw*, Pet. App. at C-11 through C-13. Under this federally approved ordinance, Tribal Court jurisdiction extends to "the fullest extent possible not inconsistent with federal law," the Tribes may exercise subject matter and personal jurisdiction. The jurisdiction over all persons of the Tribal Court may extend to and include, but not by way of limitation, the following:

. . .

> (1) All persons found within the Reservation.
>
> (2) All persons subject to the jurisdiction of the Tribal Court and involved directly or indirectly in:
>
> . . .
>
> (ii) The ownership, use or possession of any property, or interest therein, situated within the Reservation;
>
> . . .
>
> (iv) The injury or damage to property of the Tribes or a Tribal member.

Tribes Appendix at App. 6 through App. 7.

The District Court noted that although this Ordinance established that the Tribal Court is empowered to hear cases over which it has jurisdiction, it acknowledges that such jurisdiction cannot be inconsistent with federal law. *Hinshaw*, Pet. App. at C-13.

Pursuant to this Ordinance, the Tribal Court has subject matter and personal jurisdiction because Petitioner, as a resident of the Flathead Reservation at the time of the accident, is "found" on the Reservation within the meaning of Section 2(a)(1) of Chapter II of the Tribal Law and Order Code. The location of the accident, giving rise to the wrongful death and survivorship action, occurred within the exterior boundaries of the Reservation. Additionally, Petitioner owned, used, and/or possessed a motor vehicle in a manner which led to the death of Christian Mahler within the Reservation within the meaning of Section 2(a)(ii), Chapter II of the Tribal Law and Order Code. Moreover, Petitioner directly injured Gloria Mahler, a Tribal member within the meaning of Section 2(a)(iv), Chapter II of the Tribal Law and Order Code. Therefore, under the facts of this reservation affair, the Federal District Court correctly determined that Petitioner falls within the provisions of the Tribes' civil adjudicatory authority provided in Ordinance 36B, Chapter II of the Tribal Law and Order Code.

Tribal Court jurisdiction over this dispute is consistent with this Court's well-settled decisions providing for presumptive Tribal jurisdiction on reservation lands, unless affirmatively limited by specific treaty provision or federal statutes, and is consistent with this Court's decisions which have repeatedly recognized the federal policy favoring promotion of Tribal self-government. *Iowa Mutual*, 480 U.S. at 14 (1987).

Having found that subject matter jurisdiction exists under the presumptive inherent sovereignty of the Tribes which extends to reservation affairs, and that subject matter jurisdiction exists under Tribal ordinances and

case law, and having acknowledged the firmly entrenched policy favoring Tribal self-government of this Court, the question is whether federal law has expressly limited the Tribal Court's inherent adjudicatory authority to hear this matter involving a tort action brought by a Tribal member. The District Court properly concluded that Petitioner has failed to cite any treaty provision or statute that specifically divests the Tribe of its power to resolve this dispute which arises on the Reservation and directly injures the personal and familial interests of a Tribal member.

B. Public Law 280 which provides for concurrent state and Tribal jurisdiction over this type of tort action affirms tribal adjudicatory jurisdiction over this wrongful death and survivorship action.

The District Court correctly noted that the federal statutory law with the most impact on civil jurisdiction on the Flathead Reservation is Pub. L. 83-280.[2] However, rather than divest the Tribes of civil adjudicatory authority over a tort action such as in this case, Pub. L. 83-280 affirms Tribal authority in this area and serves as an important alternate basis for Tribal Court jurisdiction. Pub. L. 83-280 established a system of state and Tribal concurrent jurisdiction over criminal matters and limited

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[2] Public Law 83-280 commonly referred to as "Public Law 280," is codified at 18 U.S.C. § 1162 (criminal); 28 U.S.C. § 1360 (civil); and 25 U.S.C. §§ 1321-1322.

civil adjudicatory matters in "Indian Country".[3] Public Law 280 mandated the limited transfer of adjudicatory jurisdiction in specific civil areas and criminal jurisdiction over certain Indian reservations. This had mandatory application to six states, and permitted other states, "option" states, to assume enumerated aspects of jurisdiction voluntarily, with the consent of tribes. 25 U.S.C. §§ 1321-1322; 18 U.S.C. § 1162; and 28 U.S.C. § 1360. Tribes Appendix at App. 12 through App. 19. Montana is an "option" state.

In 1963, the Montana Legislature enacted legislation authorizing the State to assume limited "280" jurisdiction over tribal members on the Flathead Indian Reservation. §§ 2-1-301 through 2-1-307, M.C.A. Tribes Appendix at App. 20 through App. 24. This state legislation was permissive, and in accordance with federal law, it provided that "280" jurisdiction could only occur with the approval of tribes.

In 1965, the Tribal Council of the Confederated Salish and Kootenai Tribes enacted Tribal Ordinance 40-A

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[3] "Indian country" means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same. 18 U.S.C. § 1151. This definition is also used for purposes of civil jurisdiction. *DeCoteau v. District County Court*, 420 U.S. 425, 427, n. 2 (1975). Congress expressly provided that "Indian Country" includes fee patented lands and rights-of-way through reservations.

(revised), which is codified in the Tribes' Law and Order Code. This ordinance authorized State and Tribal concurrent civil adjudicatory jurisdiction in eight enumerated areas, including the "operation of motor vehicles on public streets, alleys, roads, and highways." Tribes Appendix at App. 25 through App. 26.

Public Law 280, however, did *not* extinguish nor transfer any authority the Tribes have due to their sovereign status nor did it specifically extinguish any tribal court jurisdiction. *Native Village of Venetie v. Alaska*, 918 F.2d 797, 809-810 (9th Cir. 1990). Subsection 2(a) of Tribal Ordinance 40-A expressly provides that concurrent jurisdiction remains with the Tribal Court in these eight enumerated areas of civil adjudicatory jurisdiction. Tribes Appendix at App. 26. To protect the Tribes' governmental authority and to limit the applicability of concurrent jurisdiction, subsection 2(e) of Tribal Ordinance 40-A expressly provides that if the Ordinance is interpreted to extend jurisdiction beyond what is specifically enumerated, the entire ordinance shall become void and have no effect. Tribes Appendix at App. 27.

This limited consent to civil adjudicatory jurisdiction over the "operation of motor vehicles" did not divest Tribal civil jurisdiction over *tort* actions arising on the Reservation involving Indians.[4] *California v. Cabazon*

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[4] The District Court properly rejected Petitioner's argument below that this language regarding Tribal and State concurrent adjudicatory authority over "the operation of motor vehicles upon public streets, alleys, roads, and highways" divested the Tribe's authority to regulate motor vehicle traffic and somehow impacts the Tribe's authority to resolve this

Indians, 480 U.S. 202, 207-212 (1987) (Pub. L. 280 is not a divestiture statute). *Duro* legislation, H.R. CONF. REP. No. 261, 102nd Cong., 1st Sess. 5 (1991) ("the delegation of Federal authority to state governments under Pub. L. 83-280 is generally concurrent with tribal governments jurisdiction").

The Montana Supreme Court's interpretation of state and tribal law regarding "280 jurisdiction" is that adjudicatory jurisdiction over torts involving auto accidents on the Flathead Reservation is concurrent between the Tribes and the State. *Larrivee v. Morigeau*, 184 Mont. 187, 602 P.2d 563 (1979), *cert. denied*, 445 U.S. 964 (1980) ("*Larrivee*"). The *Larrivee* Court held that because the Salish and Kootenai Tribes consented to limited concurrent civil jurisdiction with the State of Montana, in accordance with Pub. L. 280, and because one of the areas of concurrence involved the "Operation of Motor Vehicles Upon the Public Streets, Alleys, Roads and Highways," the state court could exercise civil jurisdiction over actions arising out of auto accidents involving Indians on the Reservation. The *Larrivee* Court affirmed that jurisdiction was concurrent between Montana and the Tribes over the tort action.[5]

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dispute which arises out of Petitioner's negligent conduct. In *Bryan v. Itasca County*, 426 U.S. 373 (1976), a seminal Public Law 280 case, the Supreme Court rejected Minnesota's efforts to tax and regulate personal property of tribal members based on the State's claim that Public Law 280 conferred broad civil regulatory jurisdiction to states.

[5] The Montana Supreme Court has also held, that in non-Public Law 83-280 reservations in Montana, the state court exercise of adjudicatory jurisdiction over an action brought by a non-Indian insurer and a tribal member over damages to an

Therefore, rather than support Petitioner's claim that the Tribe's jurisdiction over this tort action is diverted, the limited system of concurrent jurisdiction under Public Law 280 supports the decision below that the Tribes still retain this important attribute of sovereignty, and therefore, certiorari is not warranted.

CONCLUSION

There are no conflicting decisions among the Circuit Court of Appeals on this matter, and it is not of such importance as to warrant review. There is no bright-line rule for determining tribal adjudicatory authority, each case must be examined according to its unique facts and the multitude of considerations relevant to Tribal sovereignty, this case is consistent with the accepted and usual course of judicial proceedings. The District Court correctly and diligently applied the principles of *National Farmers Union* and *Iowa Mutual*, and well-settled principles of Indian law and congressional policy, to the unique circumstances of this case and determined the Tribal Court retained this important attribute of sovereignty to resolve this dispute which arose out of Petitioner's negligent conduct on the Reservation.

For the foregoing reasons, certiorari should be denied.

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insured automobile on a reservation would be inappropriate because it would interfere with tribal sovereignty and the right of tribal self-governance. *Milbank v. Mutual Insurance Co.*, 705 P.2d 1117, 1120 (Mont. 1985).

Respectfully submitted this 14th day of October, 1994.

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APPENDIX 1

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF INDIAN AFFAIRS

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CONSTITUTION AND BYLAWS OF THE
CONFEDERATED SALISH AND KOOTENAI TRIBES
OF THE FLATHEAD RESERVATION MONTANA

+

APPROVED OCTOBER 28, 1935

(Seal)

ARTICLE VI – POWERS AND DUTIES OF THE TRIBAL COUNCIL

SECTION 1. The Tribal Council shall have the power, subject to any limitations imposed by the Statutes or the Constitution of the United States, and subject to all express restrictions upon such powers contained in this Constitution and attached Bylaws;

(a) To regulate the uses and disposition of tribal property, to protect and preserve the tribal property, wildlife and natural resources of the Confederated Tribes, to cultivate Indian arts, crafts, and culture, to administer charity; to protect the health, security, and general welfare of the Confederated Tribes.

(b) To employ legal counsel for the protection and advancement of the rights of the Flathead Confederated Tribes and their members, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior.

(c) To negotiate with the Federal, State, and local governments on behalf of the Confederated Tribes, and to

advise and consult with the representatives of the Departments of the Government of the United States on all matters affecting the affairs of the Confederated Tribes.

(d) To approve or veto any sale, disposition, lease, or encumbrance of tribal lands and tribal assets which may be authorized or executed by the Secretary of the Interior, the Commissioner of Indian Affairs, or any other agency of the Government, *provided* that no tribal lands shall be sold or encumbered or leased for a period in excess of five years, except for Governmental purposes.

(e) To advise with the Secretary of the Interior with regard to all appropriation estimates or Federal projects for the benefit of the Confederated Tribes, prior to the submission of such estimates to the Congress.

(f) To manage all economic affairs and enterprises of the Confederated Tribes in accordance with the terms of a charter to be issued by the Secretary of the Interior.

(g) To make assignments of tribal lands to members of the Confederated Tribes in conformity with article VIII of this Constitution.

(h) To appropriate for tribal use of the reservation any available applicable tribal funds, provided that any such appropriation may be subject to review by the Secretary of the Interior, and *provided, further,* that any appropriation in excess of $5,000 in any one fiscal year shall be of no effect until approved in a popular referendum.

Amended See p.13-14

(i) To promulgate and enforce ordinances, subject to review by the Secretary of the Interior, which would

provide for assessments or license fees upon nonmembers doing business within the reservation, or obtaining special rights or privileges, and the same may also be applied to members of the Confederated Tribes, provided such ordinances have been approved by a referendum of the Confederated Tribes.

(j) To exclude from the restricted lands of the reservation persons not legally entitled to reside thereon, under ordinances which may be subject to review by the Secretary of the Interior.

(k) To enact resolutions or ordinances not inconsistent with article II of this Constitution governing adoptions and abandonment of membership.

(l) To promulgate and enforce ordinances which shall be subject to review by the Secretary of the Interior, governing the conduct of members of the Confederated Tribes, and providing for the maintenance of law and order and the administration of justice by the establishment of an Indian Court, and defining its powers and duties.

(m) To purchase land of members of the Confederated Tribes for public purposes under condemnation proceedings in courts of competent jurisdiction.

(n) To promulgate and enforce ordinances which are intended to safeguard and promote the peace, safety, morals, and general welfare of the Confederated Tribes by regulating the conduct of trade and the use and disposition of property upon the reservation, providing that any ordinance directly affecting nonmembers shall be subject to review by the Secretary of the Interior.

(o) To charter subordinate organizations for economic purposes and to regulate the activities of all cooperative and other associations which may be organized under any charter issued under this Constitution.

(p) To regulate the inheritance of real and personal property, other than allotted lands, within the Flathead Reservation, subject to review by the Secretary of the Interior.

(q) To regulate the domestic relations of members of the Confederated Tribes.

(r) To recommend and provide for the appointment of guardians for orphans, minor members of the Confederated Tribes, and incompetents subject to the approval of the Secretary of the Interior, and to administer tribal and other funds or property which may be transferred or entrusted to the Confederated Tribes or Tribal Council for this purpose.

(s) To create and maintain a tribal fund by accepting grants or donations from any person, State, or the United States.

(t) To delegate to subordinate boards or to cooperative associations which are open to all members of the Confederated Tribes, any of the foregoing powers, reserving the right to review any action taken by virtue of such delegated power.

(u) To adopt resolutions or ordinances to effectuate any of the foregoing powers.

SECTION 2. Any resolution or ordinance which by the terms of this constitution is subject to review by the

Secretary of the Interior, shall be presented to the Superintendent of the Reservation who shall, within ten days thereafter, approve or disapprove the same, and if such ordinance or resolution is approved, it shall thereupon become effective, but the Superintendent shall transmit a copy of the same, bearing his endorsement, to the Secretary of the Interior who may, within 90 days from the date of enactment, rescind said ordinance or resolution for any cause, by notifying the Council of such action: *Provided,* That if the Superintendent shall refuse to approve any resolution or ordinance submitted to him, within ten days after its enactment, he shall advise the Council of his reasons therefor, and the Council, if such reasons appear to be insufficient, may refer it to the Secretary of the Interior, who may pass upon same and either approve or disapprove it within 90 days from its enactment.

SECTION 3. The council of the Confederated Tribes may exercise such further powers as may in the future be delegated to it by the Federal Government, either through order of the Secretary of the Interior or by Congress, or by the State Government or by members of the Confederated Tribes.

SECTION 4. Any rights and powers heretofore vested in the Confederated Tribes but not expressly referred to in this Constitution shall not be abridged by this article, but may be exercised by the members of the Confederated Tribes through the adoption of appropriate bylaws and constitutional amendments.

APPENDIX 2

RESOLUTION NO. 85-188

Ordinance No. 36-B
Amend No. 4

ORDINANCE
OF THE TRIBAL COUNCIL OF
THE CONFEDERATED SALISH AND
KOOTENAI TRIBES OF THE
FLATHEAD RESERVATION

AN AMENDMENT TO ORDINANCE NO. 36-B AMENDING CHAPTER II, SECTIONS 1 and 5, OF THE TRIBES' LAW AND ORDER CODE.

BE IT ENEACTED [sic] by the Tribal Council of the Confederated Salish and Kootenai Tribes:

WHEREAS, Chapter II of the Law and Order Code of the Confederated Salish and Kootenai Tribes of the Flathead Reservation (Ordinance No. 36-B) pertains to civil jurisdiction and other civil matter [sic]; and

WHEREAS, There is a need to further clarify the civil jurisdiction of the Tribes and Tribal Courts set forth in Section 1 of Chapter II of said Code; and

WHEREAS, There is also a need to further clarify and describe the service of process procedures set forth in Section 5 of Chapter II of said Code, and

WHEREAS, Such amendments are timely in light of the United States Supreme Court's opinion in *Farmer's Union v. Crow Tribe*, ___ U.S. ___ (1985).

NOW THEREFORE, BE IT RESOLVED:

1. That Chapter II, Section 1, Paragraph 2, of the Law and Order Code of the Confederated Salish and Kootenai Tribes of the Flathead Reservation (Ordinance 36-D) is hereby amended by deleting the original language and inserting the following language in lieu thereof:

"2. a. To the fullest extent possible not inconsistent with federal law, the Tribes may exercise their civil regulatory and adjudicatory powers. To the fullest extent possible not inconsistent with federal law, the Tribal Court may exercise subject matter and personal jurisdiction. The jurisdiction over all persons of the Tribal Court may extend to an [sic] include, but not by way of limitation, the following:

(1) All persons found within the Reservation.

(2) All persons subject to the jurisdiction of the Tribal Court and involved directly or indirectly in:

(1) The transaction of any business within the Reservation;

(ii) The ownership, use or possession of any property, or interest therein, situated within the Reservation;

(iii) The entering into of any type of contract within the Reservation or wherein any aspect of any contract is performed within the Reservation;

(iv) The injury or damage to property of the Tribes or a Tribal member.

b. As used in this section, "person" means an individual, organization, corporation, governmental subdivision or agency, business trust, estate, trust, partnership, association, joint venture, or any other legal or commercial activity. Nothing in this Chapter waives any aspect of the Tribes' sovereign immunity or related privileges."

2. That Chapter II, Section 5, of the same Code is hereby amended by deleting the original language and inserting the following language in lieu thereof:

"SECTION 5. SERVICE

1. Service of Process.

a. Whenever possible, the summons and complaint shall be served on the defendant by personal service. Personal service of process shall be made by a law enforcement officer or by any person over the age of 18 who is not a party to the action.

b. If, after diligent search and inquiry, the defendant can not be personally served, process may be served (within or outside the Reservation) by mail. Service by mail shall be by registered or certified mail with return receipt requested. All service by mail must be confirmed by the Court at the time of trial or at the time of the entering of the default judgment, and must be supported by an affidavit from the plaintiff. The affidavit shall include the original return receipt, a description of documents served on the defendant, and a statement that a diligent

search and inquiry has been made to serve the defendant personally.

c. If, after diligent search and inquiry, the defendant can not be served personally or by mail, process may be served by publication.

2. *Service by Publication.*

a. The plaintiff shall file an affidavit with the Clerk of Court prior to any service by publication. This affidavit shall include a statement that the plaintiff has, after diligent search and inquiry, been unable to effect service of process on the defendant. After receiving such an affidavit, the Clerk of Court shall issue a Summons by Publication authorizing service by Publication. The Summons by Publication shall be valid for 60 days from the date of issuance, and thereafter void. The other requirements of service by publication are as follows:

(1) The Summons by Publication must be published in two consecutive issues of the Tribal newspaper, and one or more other newspapers published within the Reservation boundaries at least once each week for three consecutive weeks. The Summons by Publication shall contain: the name of the Court and the names of the parties; be directed to the defendant; state the name and address of the plaintiff's attorney, if any, otherwise the plaintiff's address; state that the defendant has 21 days after the last date of publication to answer and defend; inform defendant that failure to

answer and defend will result in judgment by default; explain the object of the complaint; and, in an action in which the title to or any interest in or lien upon real property is involved, the publication shall also contain a general or legal description of the property involved.

(2) Service by publication is complete on the date of the last publication of the summons.

(3) At the time of trial or entering of the default judgment, the plaintiff shall submit evidence to the Court that the foregoing service by publication procedures have been satisfied.

3. Service outside the Reservation.

Where service upon any defendant can not be made within the Reservation, service of process outside the Reservation may be made personally, by mail, or by publication as described in this Section, with the same force and effect as though service had been made within the Reservation."

3. That copies of the amendment shall be printed in a manner that allows it to be inserted into the Tribes' Law and Order Code. Such copies shall be distributed to appropriate persons.

CERTIFICATION

The foregoing Ordinance was duly adopted by the Tribal Council of the Confederated Salish and Kootenai Tribes of the Flathead Reservation on the 9th day of August,

1985 with a vote of 9 for, 1 opposed, and 0 not voting, pursuant to the authority vested in it by Article VI, Section 1 (a), (l), (n), (t), and (u) of the Tribes' Constitution and Bylaws; said Constitution adopted and approved under Section 16 of the Act of June 18, 1934 (48 Stat. 984) as amended.

/s/ James H. Steele
Vice Chairman,
Tribal Council

ATTEST:

/s/ Joseph M. Dupuis
Executive Tribal Secretary

APPENDIX 3

18 U.S.C. § 1162. State jurisdiction over offenses committed by or against Indians in the Indian country

(a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

State or Territory of	*Indian country affected*
Alaska	All Indian country within the State, except that on Annette Islands, the Metlakatla Indian community may exercise jurisdiction over offenses committed by Indians in the same manner in which such jurisdiction may be exercised by Indian tribes in Indian country over which State jurisdiction has not been extended.
California	All Indian country within the State.
Minnesota	All Indian country within the State, except the Red Lake Reservation.
Nebraska	All Indian country within the State.
Oregon	All Indian country within the State, except the Warm Springs Reservation.
Wisconsin	All Indian country within the State.

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section as areas over which the several States have exclusive jurisdiction.

SUBCHAPTER III – JURISDICTION OVER CRIMINAL AND CIVIL ACTIONS

25 U.S.C. § 1321. Assumption by State of criminal jurisdiction

(a) Consent of United States; force and effect of criminal laws

The consent of the United States is hereby given to any State not having jurisdiction over criminal offenses committed by or against Indians in the areas of Indian country situated within such State to assume, with the consent of the Indian tribe occupying the particular Indian country or part thereof which could be affected by such assumption, such measure of jurisdiction over any or all of such offenses committed within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over any such offense committed elsewhere within the State, and the criminal laws of such State shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

(b) Alienation, encumbrance, taxation, and use of property; hunting, trapping, or fishing

Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner

inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

25 U.S.C. § 1322. Assumption by State of civil jurisdiction

(a) Consent of United States; force and effect of civil laws

The consent of the United States is hereby given to any State not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such State to assume, with the consent of the tribe occupying the particular Indian country or part thereof which would be affected by such assumption, such measure of jurisdiction over any or all such civil causes of action arising within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

(b) Alienation, encumbrance, taxation, use, and probate of property

Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner

inconsistent with any Federal treaty, agreement, or statute, or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

(c) Force and effect of tribal ordinances or customs

Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.

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28 U.S.C. § 1360. State civil jurisdiction in actions to which Indians are parties

(a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State:

State of	*Indian country affected*
Alaska	All Indian country within the State
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate,

in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.

APPENDIX 4

Part 3
Jurisdiction on Indian Lands
(MCA)

Part Cross-References

State-tribal cooperative agreements, Title 18, ch. 11.

2-1-301. Assumption of criminal jurisdiction of Flathead Indian country. The state of Montana hereby obligates and binds itself to assume, as herein provided, criminal jurisdiction over Indians and Indian territory of the Flathead Indian reservation and country within the state in accordance with the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd congress, 1st session).

History: En. Sec. 1, ch. 81, L. 1963; R.C.M. 1947, 83-801.

2-1-302. Resolution of Indian tribes requesting state jurisdiction – governor's proclamation – consent of county commissioners. (1) Whenever the governor of this state receives from the tribal council or other governing body of the Confederated Salish and Kootenai Indian tribes or any other community, band, or group of Indians in this state, a resolution expressing its desire that its people and lands be subject to the criminal or civil jurisdiction, or both, of the state to the extent authorized by federal law and regulation, he shall issue within 60 days a proclamation to the effect that such jurisdiction applies to those Indians and their territory or reservation in accordance with the provisions of this part.

(2) The governor may not issue the proclamation until the resolution has been approved in the manner provided for by the charter, constitution, or other fundamental law of the tribe or tribes, if said document provides for such approval, and there has been first obtained the consent of the board of county commissioners of each county which encompasses any portion of the reservation of such tribe or tribes.

History: En. Sec. 2, Ch. 81, L. 1963; R.C.M. 1947, 83-802; amd. Sec. 2, Ch. 184, L. 1979.

2-1-303. Date of assumption of jurisdiction – application of state law in Indian country. Sixty days from the date of issuance of the proclamation of the governor as provided for by 2-1-302, the state of Montana shall assume jurisdiction over offenses committed by or against Indians in the lands prescribed in the proclamation to the same extent that this state has jurisdiction over offenses committed elsewhere within this state. The criminal and/or civil laws of this state shall have the same force and effect within such lands as they have elsewhere within this state.

History: En. Sec. 3, Ch. 81, L. 1963; R.C.M. 1947, 83-803.

2-1-304. Rights, privileges, and immunities reserved to Indians. Nothing in this part shall:

(1) authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States;

(2) authorize regulation of the use of such property in a manner inconsistent with any federal treaty, agreement, or statute or with any regulation made pursuant thereto;

(3) confer jurisdiction upon the state of Montana to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein; or

(4) deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under federal treaty, agreement, statute, or executive order with respect to hunting, trapping, fishing, or the control, licensing, or regulation thereof.

History: En. Sec. 4, Ch. 81, L. 1963; R.C.M. 1947, 83-804.

Cross-References

Compact with the United States – reaffirmation of state disclaimers concerning Indian land, Art. I, Mont. Const.

2-1-305. Indian culture protected. Nothing in this part shall deprive the Indian tribe, band, or community from carrying on its age-old tribal dances, feasting, or customary Indian celebrations or in any way try to destroy the Indian culture.

History: En. Sec. 5, Ch. 81, L. 1963; R.C.M. 1947, 83-805.

Cross-References

Educational goal to preserve Indian cultural integrity, Art. X, sec 1(2), Mont. Const.

2-1-306. Withdrawal of consent to state jurisdiction. (1) No sooner than 6 months after April 24, 1993, and after consulting with local government officials concerning implementation, the Confederated Salish and Kootenai tribes may, by tribal resolution, withdraw consent to be subject to the criminal misdemeanor jurisdiction of the state of Montana. Within 6 months after receipt of the resolution, the governor shall issue a proclamation to that effect.

(2) The Confederated Salish and Kootenai tribes may, by separate resolution, withdraw consent to be subject to those areas of civil jurisdiction of the state of Montana that are delineated in tribal ordinance 40-A (revised and enacted May 5, 1965). The withdrawal is limited to those delineated areas of civil jurisdiction, agreed upon in writing by the governor after consultation with the attorney general and officials of affected local governments. The tribes shall initiate this process by sending a certified letter to the governor. After consultation and execution of a written agreement between the governor and the tribes, the agreed-upon civil areas must be incorporated into a tribal resolution to be enacted by the tribes. Within 6 months after receipt of the tribal resolution, the governor shall issue a proclamation to that effect that reflects the terms of the written agreement.

(3) Subsections (1) and (2) do not alter the existing jurisdiction or authority of the Confederated Salish and Kootenai tribes or the state of Montana, except as expressly provided for in subsections (1) and (2).

History: En. Sec. 6, Ch. 81, L. 1963; R.C.M. 1947, 83-806; amd. Sec. 1, Ch. 542, L. 1993.

Compiler's Comments

1993 Amendment: Chapter 542 substituted present section regarding withdrawal of consent to state jurisdiction for former section that read: "Any Indian tribe, community, band, or group of Indians that may consent to come within the provisions of this part may within 2 years from the date of the governor's proclamation withdraw their consent to be subject to the criminal and/or civil jurisdiction of the state of Montana, by appropriate resolution, and within 60 days after receipt of such resolution, the governor shall issue a proclamation to that effect." Amendment effective April 24, 1993.

2-1-307. Service of process. All legal process of the state, both civil and criminal, may be served upon persons and property found on any Indian reservation in all cases where the United States has not exclusive jurisdiction.

History: En. Sec. 41, Pol. C. 1895; re-en. Sec. 22, Rev. C. 1907; re-en. Sec. 21, R.C.M. 1921; re-en. Sec. 21, R.C.M. 1935; R.C.M. 1947, 83-103(part).

APPENDIX 5

CONFEDERATED SALISH AND KOOTENAI TRIBES
OF THE
FLATHEAD RESERVATION, MONTANA

Tribal Ordinance 40-A (Revised)

ORDINANCE OF THE TRIBAL COUNCIL OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD INDIAN RESERVATION, AMENDING SECTIONS AND CHAPTERS OF THE "ORDINANCE OF THE TRIBAL COUNCIL OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, MONTANA, NO. 36-A (Revised) ADOPTED MAY 23, 1962", HEREINAFTER REFERRED AS THE "OFFICIAL CODE OF ORDINANCES", AS FOLLOWS:

Be it enacted by the Tribal Council of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Dixon, Montana:

That Chapter 1, Section 2, Jurisdiction, of the Official Code of Ordinances be and the same is hereby amended to add subsections 1 and 2 of this ordinance following paragraph three to read as follows:

"Subsection 1: Subject to the conditions and limitations expressed in Subsection 2 hereof, the laws and jurisdiction of the State of Montana, including the judicial system of the State, are hereby extended pursuant to, and subject to the conditions in, the Act of the Montana Legislature of February 27, 1963, Laws of Montana, 1963, Vol. 1, Chap. 81, P. 170, to Indians within the Flathead Reservation to the extent such laws and jurisdiction relate to the subjects following:

(a) Compulsory School Attendance

(b) Public Welfare

(c) Domestic Relations (except adoptions)

(d) Mental Health, Insanity, Care of the Infirm, Aged and Afflicted

(e) Juvenile Delinquency and Youth Rehabilitation

(f) Adoption Proceedings (With consent of the Tribal Court)

(g) Abandoned, Dependent, Neglected, Orphaned or Abused Children

(h) Operation of Motor Vehicles upon the Public Streets, Alleys, Roads and Highways

(i) All Criminal Laws of the State of Montana; and all Criminal Ordinances of Cities and Towns with [sic] the Flathead Indian Reservation.

Subsection 2. The effectiveness of Subsection 1 hereof is conditioned upon the following:

(a) Concurrent jurisdiction remains (where applicable with Federal Courts) with the Tribal Court and in the Tribal Government of all matters referred to in Subsection 1; and any matter initiated in either a state or Federal Government Court or the Tribal Court shall be completed and disposed of in that Court, and shall not be subject to re-examination in the courts of the other jurisdiction.

(b) No person, once convicted of a crime falling within the jurisdiction of the State or

Federal Government, or the Tribes pursuant to this ordinance, shall be punished for the identical act in the courts of the other jurisdiction, but shall be accorded the benefit of the doctrine of former jeopardy as if the separate jurisdictions were one.

(c) This ordinance is subject to possible referendum of the eligible voters of the Confederated Tribes pursuant to Article IX of the Constitution of the Confederated Tribes, and if a referendum is authorized and this ordinance disapproved by a majority under the conditions set forth in Article IX this ordinance shall be void and of no effect to transfer any jurisdiction to the State of Montana and its judicial system.

(d) All jurisdiction of the Confederated Tribes under their Constitution and Bylaws, and ordinances enacted pursuant thereto, and of the Federal Government under the United States Criminal Code, to the extent not expressly transferred by Subsection 1 hereof, remains in the Confederated Tribes and in the Federal Government respectively to the same extent as if this ordinance had not been adopted.

(e) If any provision of the Act of the Montana Legislature of February 27, 1963, Laws of Montana 1963, Vol. 1 Chap. 81, or of this ordinance shall be held invalid, or if this ordinance be held to extend a jurisdiction more extensive than set forth herein, or if any condition herein be not complied with or be held invalid or ineffective, then this entire ordinance shall be held to be void and of no effect from the beginning.

(f) In the event of any alleged violation of the Civil Rights of Tribal members by operation of this ordinance, the Tribal Council reserves the right to conduct an independent investigation of the alleged act; to seek redress in a court of competent jurisdiction; and to review the ordinance upon the validation of any such alleged offense.

Provided further that any sentences or convictions, lawfully inflicted under the provisions of this ordinance, shall not be affected by subsequent cancellation or voidance of this ordinance."

All ordinances and parts of ordinances in conflict herewith are hereby repealed (specifically Tribal Ordinance 40-A approved May 19, 1964).

CERTIFICATE

The foregoing ordinance was adopted by the Tribal Council of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana pursuant to the Act of the United States Congress of August 15, 1953; 67 Stat. 588, as amended (13 U.S. Code Section 1162; 28 U.S. Code Section 1360); the Act of the Legislature of Montana, February 27, 1963, Laws of Montana 1963, Vol. 1, Chap. 81, p. 170; and Article VI, Sec. 1, subsections (c), (n) and (q) of the Constitution of the Confederated Tribes, pursuant to Section 16 of the Indian Reorganization Act of

June 18, 1934, 48 Stat. 984, the 5th day of May, 1965, by a vote of 7 for, 0 against, and 0 not voting.

/s/ Walter W. McDonald
Walter W. McDonald
Chairman, Tribal Council

ATTEST: /s/ Alvin E. Sloan
Alvin E. Sloan
Secretary